Property") and to purchase another 19 acres in Putnam County for development (the "Development Property"). R. 1798-1843.

Petitioner never made a single payment to Respondent in connection with the four mortgages. *See* Petitioner's App. at 57-58. In June 1983, Respondent commenced foreclosure proceedings ("Foreclosure Proceedings"). In December 1984, the Foreclosure Proceedings were completed and Respondent obtained title to the Lake and Development Properties. R. 1853-1857, 2087-2215. At that point, Petitioner no longer had title to the Lake Property where she lived, or the Development Property or any financial obligations to Respondent – her two loans were extinguished as a result of the foreclosures. R. 228, 2087-2215.

II. 1985: PETITIONER AND RESPONDENT ENTER INTO THE AGREEMENT

A. December 1984 - March 1985: Petitioner Approached Respondent to Enter Into a Business Venture and the Parties Negotiate the Agreement

1. *Petitioner's Proposal to Respondent*

In late December 1984, Petitioner approached Respondent with a proposal for a business deal to develop and sell the Development Property. Petitioner's App. at 71; R. 223-225, 489-490.

Petitioner proposed a short-term business arrangement to allow her to complete the development and sale of the Development Property and thereby earn a sufficient profit to enable her to purchase the Lake Property from Respondent

("Joint Venture"). R. 491, 1789-1797. Petitioner represented that she had real estate expertise, was a licensed broker in New York, had been working for the past year to develop the Development Parcel, and that the process would be completed in four to six months. Petitioner's App. at 56, 59-60; R. 224-225, 229-230, 1028. In total, Petitioner and Respondent had four face-to-face meetings, and numerous telephone conversations, to negotiate the deal over the course of several months. R. 226, 490-492, 1789-1797. The Agreement was signed on March 1, 1985. Petitioner's App. at 58; R. 225, 964, 1789-1797.

2. *The Strong Real Estate Market in Late 1984 and Early 1985*

As the Trial Judge found, in late 1984 and early 1985 the New York real estate market was "very favorable." Petitioner's App. at 63. As such, the parties were "encouraged" that they could earn top dollar for the Development Property. *Id.*; 1789-1797. The Trial Court concluded that had the development proceeded on Petitioner's original five-month time frame, the parties "probably could or would have generated the profit [Petitioner and Respondent] foresaw on March 1, 1985 and sought to achieve." Petitioner's App. at 63.

B. The Terms of the Agreement

In accord with Petitioner's proposal, the Agreement basically provided that the parties would work together to develop and sell the Development Property within five months and, in the meanwhile, Petitioner could remain in the Lake Property house, which Respondent would refrain from selling. R. 1789-1797. During the venture, Petitioner

agreed to pay rent for the Lake Property but, the parties understood that Petitioner would not actually pay this rental charge. Instead, it would be charged against the Joint Venture. Respondent agreed to contribute the Development Property to the Joint Venture and to pay all development expenses, such as engineering, architectural, maintenance, and municipal approval costs. Petitioner's App. at 59; R. 1789-1797. Petitioner agreed to act as Respondent's agent and perform the day-to-day tasks to cultivate the Development Property, complete the subdivision approval process, and sell the lots. Petitioner's App. at 59; R. 1789-1797. If the Joint Venture was profitable, they would share the profits, and Petitioner would have the option to purchase the Lake Property for the below-market price of $150,000.[1] R. 490-492, 1789-1797. If the venture was not profitable, Respondent – not Petitioner – would be responsible for the shortfall and all expenses, and Petitioner would have to vacate the Lake Property. R. 1789-1797.

III. MARCH 1985 - MAY 1991: THE DEVELOPMENT AND SALE PROCESS OF THE DEVELOPMENT PROPERTY TAKES SIX YEARS, NOT SIX MONTHS

A. Petitioner's Errors and Miscalculations Delay the Receipt of Municipal Approval

Unfortunately, in large part due to Petitioner's many mistakes, the development and sale of the Development Property took more than six years, not the four to six months initially represented by Petitioner.[2] Petitioner's App. at 58-

1. Petitioner testified at trial that the Lake Property wasappraised for $482,000 in 1989. R. 517.

2. The Trial Court found: "Unfortunately, [Petitioner] failed to realize that this approval under the applicable regulations would (Cont'd)

63; R. 229-230, 235-236, 1861-1868, 1895-1926. Indeed, it was not until July 1987, the parties obtained subdivision approval for about one-half of the property, and it took another year until they received final approval for the entire subdivision, consisting of eleven individual lots. Petitioner's App. at 60; R. 1742, 1861-1868.

B. The Sale of the Lots Takes Four Years in an Unfavorable Market

Petitioner was responsible to secure potential buyers of the Development Property. R. 254-255, 1792-1793. However, by the time the first lots were available for sale in mid-1987, the real estate market had taken a severe downturn. Petitioner's App. at 63; R. 616-617, 998, 1028-1029. The Trial Court found that: "the real estate market was severely affected by the stock market decline in 1987. Undoubtedly, this was an additional factor in preventing a speedy and profitable sale of the [Property]." Petitioner's App. at 63. In the end, it took the joint venture almost four years to sell the Development Property because of the market conditions and the default by the first buyer that Petitioner introduced.

(Cont'd)

require central water and sewer. It was then obvious that the small number of units could never support such an expensive infrastructure." Petitioner had to re-work her plan altogether, and encountered a number of problems, including: (a) a portion of the property was considered a "wetland" area; (b) certain lots had drainage problems; and (c) there were many difficulties in planning and building a road. Petitioner's App. at 60; R. 244-245, 270-271.

IV. 1991: THE JOINT VENTURE TERMINATES

The Joint Venture terminated in March 1991, with the sale of the final lots. Petitioner's App. at 63; R. 1357, 1914-1926, 2906-2907. Respondent informed Petitioner that the Joint Venture had not been profitable. R. 2904-2905. By letter dated January 23, 1992, Respondent demanded that Petitioner vacate the Lake Property on or before March 1, 1992, but Petitioner refused to do so. Petitioner's App. at 63; R. 497, 812, 2907. From March 1992 until January 2001, Petitioner occupied the Lake Property against Respondent's will and never paid one penny in rent to Respondent. R. 497, 499-500, 812, 2907. In addition, Respondent had no choice but to continue to pay all taxes and insurance on the Lake Property during that time period. R. 812, 1123.

V. COUNTER-STATEMENT OF PROCEDURAL HISTORY

A. The Trial

On September 23, 1992, Respondent commenced a summary proceeding in Justice Court in Putnam County, New York to evict Petitioner from the Lake Property (the "Summary Proceeding"). Petitioner's App. at 63; R. 136-137, 812. On February 10, 1993, Petitioner filed the instant lawsuit in Supreme Court, Putnam County ("Trial Court"), against Respondent alleging five causes of action: (i) unjust enrichment; (ii) constructive trust; (iii) accounting; (iv) fraud; and (v) to compel determination of the parties' interests in the Lake Property pursuant to Article 15 of the Real Property Actions and Proceedings Law of the State of New York. R. 88-92. Shortly thereafter, Petitioner moved: (i) for the summary proceeding to be stayed; and (ii) for the

consolidation of the two actions. Petitioner's App. at 64. By Order dated June 18, 1993, the Trial Court stayed Petitioner's eviction proceeding and consolidated it with this action. *Id.*

Respondent answered Petitioner's complaint and asserted three counterclaims seeking: (i) judgment awarding Respondent possession of the Lake Property; (ii) a warrant for Petitioner's removal therefrom; or, (iii) in the alternative, damages and costs. R. 108-111.

During the next six years, the parties took depositions and Petitioner engaged in "an enormous amount of paper discovery." *Id.* In response to Petitioner's insistence that the Properties had been sold numerous times, and at the Trial Court's suggestion, the parties hired a third-party to conduct a complete title search of each of the eleven lots in the Development Property, which was completed in mid-fall of 1999. R. 3384-3905. There was no evidence of fraud or multiple sales of the same parcels.

In December 1999/January 2000, the Trial Judge, Hon. S. Barrett Hickman, conducted a three-week bench trial. During the trial, four fact witnesses and two accounting experts testified, and the parties introduced 138 exhibits encompassing more than 2,200 pages. At trial, Petitioner focused primarily on three issues: (i) whether the Agreement created a joint venture or reinstated the mortgagor-mortgagee relationship; (ii) whether Respondent fraudulently sold certain of the development lots multiple times; and (iii) whether Respondent fraudulently accounted for the real estate development proceeds. Indeed, at trial for almost 200 pages of trial testimony, Petitioner detailed her wild and unsupported theories about alleged "conspiracy" and "double sales" of the lots, "fraud . . . in the dark of night," "telltale

fact[s]," "locked eyes," "funneled" monies, and "fake documents." *See*, *e.g.*, R. 287-288, 372, 376-377, 445-446, 463-466, 481-483, 1636, 1760 and 1776.

On May 19, 2000, the Trial Court issued its Decision and Order setting forth its legal and factual findings which would form the basis of the court-approved accounting for the joint venture. The Trial Court held, *inter alia*: (i) the Agreement created a joint venture relationship between the parties and did not reinstate any of Petitioner's original mortgages; (ii) Petitioner received adequate consideration in the Agreement; and (iii) Respondent did not commit fraud. Petitioner's App. at 68-86. The Trial Court also requested the parties prepare a final accounting based on the determinations in the Decision and Order that would then finally determine whether the Joint Venture was profitable. *See* Petitioner's App. at 82.

In August 2000, after the parties' accountants had met, the parties realized that there were accounting questions that were not specifically addressed in the Decision & Order. Therefore, Respondent and Petitioner *jointly* requested further guidance concerning specific accounting issues from the Court. On August 29, 2000, in response to the parties' joint request, the Trial Court provided further written instructions which answered the parties' questions by providing guidance on how certain items should be prepared for the accounting.[3]

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3. For instance, in the Decision and Order, the Trial Court held that the interest after the initial five month period "should be simple interest per annum." R. 79-80. Consistent therewith, the Trial Court instructed the parties to use simple interest (compounded annually) in the joint accounting. R. 121-122.

(Cont'd)

Based on the Trial Court's Decision & Order and further instructions, the parties submitted a joint accounting.

In its Judgment, dated October 26, 2000 ("Judgment"), the Trial Court: (i) dismissed Petitioner's Complaint; (ii) ordered Petitioner's eviction from the Lake Property pursuant to Respondent's counterclaim and petition; and (iii) approved a final accounting for the Joint Venture, which showed that the expenses of the venture had exceeded income by more than $288,000. *See* Petitioner's App. at 9-55.

B. The Appeal

On October 26, 2000, Petitioner filed a Notice of Appeal. R. 2-3. On January 9, 2001, Petitioner filed a Voluntary Petition for Bankruptcy in United States Bankruptcy Court for the Southern District of New York (Case No. 01-30005). In May 2001, the Bankruptcy Court granted Respondent's motion to lift the automatic stay and on June 13, 2001, after 18 ½ years of rent-free tenancy, Petitioner was evicted from the Lake Property. In September 2001, the Bankruptcy Court dismissed Petitioner's bankruptcy case. After Petitioner did nothing to pursue her appeal from the Trial Court for another two years, the Appellate Division dismissed her appeal on September 4, 2003. The appeal was eventually reinstated upon motion by Petitioner.

(Cont'd)

As a second example, in the Decision & Order, the Trial Court held that Petitioner "should receive some consideration " for her equity in the Development Property. Petitioner's App. at 83 (emphasis added). In its instructions, the Trial Court informed the parties when that consideration should be accounted for during the six years of the joint venture.

In a Decision & Order dated December 27, 2004, the Appellate Division, after extensive briefing and oral argument, unanimously denied Petitioner's claims and affirmed the Trial Court's factual findings and interpretation of New York law. Specifically, the Appellate Division held that, under New York law, the Agreement created a joint venture and did not constitute a reinstatement of Petitioner's mortgages. The Appellate Division also denied Petitioner's claims that: (i) the Court lacked jurisdiction to evict Petitioner; and (ii) Respondent's actions were fraudulent.[4]

In a Decision & Order on Motion dated March 28, 2005, the Appellate Division denied Petitioner's motion to reargue, resettle and amend its Decision & Order or, in the alternative, for leave to appeal to the New York Court of Appeals.

In a Decision dated July 6, 2005, the New York Court of Appeals denied Petitioner's motion for leave to appeal. On November 17, 2005, the Court of Appeals also denied Petitioner's motion for reargument of her motion for leave to appeal.

STANDARD

When a writ is sought to review a state court decision, this Court will only have jurisdiction if the case has been appealed to the highest court in the state and: (1) the state court reviewed the validity of a statute or treaty; (2) the validity of a state statute is drawn into question on the ground of its being "repugnant to the Constitution, treaties, or laws

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4. The Appellate Division modified the Judgment to eliminate the award of monetary damages to Respondent for Petitioner's possession of the Lake Property from 1992 through 2001.

of the United States," or (3) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . ." 28 U.S.C. § 1257. The federal issue must be either raised or "squarely considered and resolved" by the state court. *See, e.g., Illinois*, 462 U.S. at 218 n.1.

Writs are granted only for compelling reasons. *See* Sup. Ct. R. 10. As relevant here, this Court limits its review to cases where a state court has decided "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(b), (c). This Court will decline review of a state court decision that rests on independent and adequate state law grounds. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S. Ct. 2849, 53 L. Ed. 2d. 965 (1977). A petition based on erroneous factual findings is also "rarely granted," because the Court will defer to state court findings of fact in the absence of exceptional circumstances. *See Hernandez v. New York*, 500 U.S. 352, 366, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (plurality opinion).

REASONS FOR DENYING THE PETITION

I. THIS REAL ESTATE JOINT VENTURE DISPUTE DOES NOT PRESENT FEDERAL OR CONSTITUTIONAL QUESTIONS APPROPRIATE FOR REVIEW BY THIS COURT

Despite Petitioner's exhortations, this run-of-the-mill real estate dispute does not present any issues of federal or Constitutional importance. This case is about an unprofitable real estate joint venture between a New York savings bank

and a New York resident. The parties entered into a joint venture agreement – governed by New York law – to develop and sell eleven small building lots in Putnam County, New York. Once the Property was finally sold, the parties brought New York state court actions against each other to resolve issues related to the Agreement and the amount of proceeds properly attributable to their joint venture. The Court should reject out of hand Petitioner's mix of inscrutable, strained and, at times, fabricated Constitutional claims.

A. The Appellate Division Did Not Apply Harmless Error Review

Contrary to Petitioner's claim, the Appellate Division did not apply a harmless error analysis to their review of the Judgment. There is no mention of harmless error review in the Appellate Division's Decision & Order and Petitioner fails to point to any language that can be construed as such.[5] *See Dimery v. Ulster Savings Bank*, 13 A.D. 3d 574, 574-75, 789 N.Y.S. 2d 159 (2d Dep't 2004). Instead, the Appellate Division reversed the only Trial Court error it found, and upheld the Trial Court's primary finding that the Agreement created a joint venture because it was based on a "fair" interpretation of the evidence. *Id.*

B. The Trial Court Did Not Adjudge Respondent Incompetent

Contrary to Petitioner's bold misrepresentation, no New York court adjudged Respondent "incompetent."

5. Petitioner's argument actually seems to be that the Trial Court found certain of Respondent's actions harmless instead of fraudulent. This type of factual inquiry has nothing to do with harmless error review and has no place before this court. *See Hernandez*, 500 U.S. at 366.

Petitioner never raised this issue before any New York court and no New York court passed upon it *sua sponte*. Petitioner apparently divines this novel issue from the Trial Court's analysis of whether Respondent committed fraud – a factual determination based on state law that was upheld by a unanimous Appellate Division and is not reviewable by this Court.

Moreover, Petitioner's ill-conceived Fifth Amendment claim does warrant review. None of Respondent's representatives ever sought Fifth Amendment protection in this case and, moreover, no such issue was presented for review before the New York courts. *See id.* Similarly, Petitioner's New York state banking law claim, also never raised below, does not warrant review. No Court considered, nor was even asked to consider, whether Respondent violated any New York state banking law which, in any case, would not be reviewable. In contrast to what Petitioner would have this Court believe, there is not even a shred of evidence to suggest that Respondent violated any New York banking law, and indeed, Petitioner's allegation of misconduct – to wit, Petitioner's fraud claims – were squarely rejected by the New York courts.

C. There Are No "Structural Errors" That Require Reversal

1. *The Case Proceedings Were Not Erroneous*

Petitioner's claim that Respondent submitted conflicting affidavits is a factual dispute appropriate for review by the Trial Court – not the United States Supreme Court. *See Hernandez*, 500 U.S. at 366. Moreover, it was not raised

to or passed upon by the New York Appellate Division and surely does not raise a Constitutional issue or relevant conflict for this Court's review. *See* 28 U.S.C. § 1257; *Illinois*, 462 U.S. at 218 n.1.

2. *There Is No Evidence of Judicial Bias and Petitioner Had an Extensive Opportunity to be Heard*

There is no evidence whatsoever to support Petitioner's spurious claims that the Trial Judge was biased. The Trial Judge was more than accommodating to Petitioner and, for example, listened to her testify for more than six days about plainly fanciful suppositions and claims. Overall, the trial lasted three weeks, included 138 exhibits covering 2,200 pages, and four fact witnesses, and two accounting experts. Thereafter, the Court decided the germane legal issues to prepare an accounting. The process was fair and impartial. The Trial Court gave Petitioner a more than adequate opportunity to be heard and did not prejudge this case.

In addition, this issue further does not warrant review because it was raised for the first time in the Petition. *See Illinois*, 462 U.S. at 218 n.1.

D. The Trial Court's Written Instructions Do Not Create An Issue Appropriate For Review By This Court

Petitioner's claim that the Trial Court acted improperly by providing specific advice on several accounting-related questions following the Decision & Order is meritless. First, Petitioner *requested* that very guidance. Second, that advice was part of the procedure that the Trial Court had established

to adjudicate the case. The first step was a trial to determine the overarching legal and factual issues. The second step was the preparation of an accounting based on those determinations. In proceeding to the second step, *both* parties realized that their experts needed further guidance on how to properly reflect certain transactions in the accounting. The Trial Court provided that guidance.

In doing so, the Trial Court did not exercise appellate jurisdiction. Petitioner does not state why, under New York or federal law, the Trial Court could not provide the additional specific guidance that was *jointly requested in writing* by the parties to assist them in preparing a final joint venture accounting. The Trial Court did not make any substantive changes to its Decision and Order in its supplementary memorandum. R. 120-122. Again, this New York state procedural issue is not a federal or Constitutional issue appropriate for review by this court. *See Zacchini*, 433 U.S. at 568.

E. The Trial Court Had Jurisdiction to Evict Petitioner

The Trial Court had jurisdiction to evict Petitioner.[6] The issue Petitioner presents here — whether the description of the Lake Property in the Petition meets New York State law standards — is a New York state procedural issue which is not reviewable by this Court.[7] *See Zacchini*, 433 U.S. at 568.

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6. *See* Petitioner's App. at 81-82; *Village of Woodbridge v. Proyect*, 18 Misc.2d 621, 624-625 (Co. Ct. Sullivan Co. 1959).

7. Petitioner's citation of purportedly conflicting holdings within New York is not the type of inter-state conflict this Court will adjudicate. *See* Sup. Ct. R.10.

Moreover, Petitioner's Constitutional rights were not violated. Petitioner had notice of the Summary Eviction Proceeding. Petitioner was personally served with the Notice of Petition, Petition and the Warrant of Eviction at the Lake Property.[8] In response, she filed the New York Supreme Court action and successfully moved to have the Summary Proceeding stayed and to have the two actions consolidated. Petitioner's App. at 64. Respondent then counterclaimed in the Supreme Court, Putnam County, action to evict Petitioner. R.108-111. In all, possession of the Lake Property was the subject of four pleadings and 15 years of litigation. For Petitioner to continue to allege that the New York court did not have jurisdiction to decide this issue – which she raised in her own Complaint in this action – is ludicrous. [9]

Moreover, Petitioner has not offered any evidence that the address listed in the Petition is incorrect, other than her *ipse dixit* speculation about where Mahopac, New York ends and Mahopac Falls, New York begins and ends in Putnam County. Instead, Petitioner repeatedly used the address contained in the Petition from 1983 until she was evicted.[10] R. 97, 139.

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8. The process server personally served Petitioner with the Notice of Petition and Petition. He recorded Petitioner'saddress as "Box 338, South Lake Blvd., Mahopac Falls, New York 105[illegible]." R. 140. Petitioner testified under oath at trial that these documents were "delivered to [her] home." R. 315.

9. Petitioner's point regarding the requirements of N.Y. C.P.L.R. § 507 is moot because she did not appeal the foreclosure actions, and as the Trial Court held, she waived this issue when she voluntarily deeded the properties to Respondent as part of the Joint Venture. *See* Petitioner's App. at 80.

10. (i) her Answer to the Petition in the Summary Proceeding; (ii) the Agreement; (iii) her monthly banking statements and personal (Cont'd)

The undisputed fact remains that Petitioner lived *for free* in Respondent's house in excess of 15 years and used every tactic imaginable to forestall her eviction, including this litigation. Petitioner had ample notice and opportunity to be heard and, as such, there is no Constitutional violation.

CONCLUSION

For the foregoing reasons, Respondent Ulster Savings Bank respectfully requests that this Court deny the Petition for a writ of certiorari in its entirety, grant Respondent its costs and expenses for opposing this motion, including attorneys' fees, and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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(Cont'd)

checks; (iv) third-party vendor invoices for the Joint Venture; (v) correspondence with Respondent, the State of New York Department of Transportation, and the Town of Carmel; and (vi) pleadings in this case; and (vii) her testimony at trial.

(3)

No. 05-1063

In The

Supreme Court of the United States

ALICE LARAINE DIMERY,

Petitioner,

v.

ULSTER SAVINGS BANK,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Division, Supreme Court Of New York, Second Judicial Department

REPLY BRIEF FOR PETITIONER

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> [W]hatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial . . . . We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted.
>
> *Fay v. NOLA*, 372 U.S. 391, 411 (1963)

The Respondent's "*ipse dixit* speculation" statement regarding an inability to determine city boundary lines is demonstrative of [*Brief in Opposition* (Opp.) page 18] the bank's cavalier attitude regarding proper procedures and pleadings as established by law, and the total irrelevance of the *veracity* of factual claims made by the Respondent. Keenly aware of the standards of review for each stage of the appeal process, the Respondent creates phantasmogoria. What the record establishes, what in fact occurred, are beside the point. In its Brief [Opp.] the Respondent makes false material statements, libels the Petitioner, ignores and distorts the record, feigns disbelief that the Petitioner should dare assert that constitutional guarantees are relevant issues in the conduct of state proceedings, and claims specific Appellate court holdings regarding matters on which the court remained silent. The Appellate court did not address, the joint venture determination or accounting, fraud, statutory compliance of the summary proceeding petition, eviction issues, jurisdictional issues, constitutional questions, false assignment of liability under judgment, or bank conduct. [Petitioner's Brief (P.Brief) App.3] At page 8 [Brief Opp.] the Respondent bank makes false claims of tax and insurance payments relative to Petitioner's residential property. Those taxes not paid out of pocket by the Petitioner (subdivision taxes) were repaid in full to the Respondent at 13.5%

interest for the use of the funds. All insurance premiums relative to the residential property were paid out of pocket by the Petitioner under an owner's policy issued in the name of the Petitioner as evidenced in Brief App.104. By Order of the trial court, the name of the mortgagee on the Petitioner's owner's policy, was changed from that of Ulster Savings Bank to that of Clerk of the Supreme Court of the County of Putnam, a fact known to the Respondent, rendering its false statements to this Court deliberate acts of deception.

Further, the record establishes that proper and timely foundation either before the trial court or the appellate courts has been laid for preservation of all subjects in Petitioner's brief. The Respondent perhaps misreads the Petitioner's statements regarding the Fifth Amendment issue, which were appropriately included relative to the determination of "incompetence" which, *de facto*, did shield the Respondent from the consequences of its conduct as evidenced on the face of the record. The Respondent's most commonly used phrase at trial was, "The document speaks for itself." The documents bespoke misconduct, errors and omissions. This was clearly understood, and articulated by the trial court, and held to be "incompetence," shielding the Respondent from accountability and liability to the Petitioner, raising the constitutional question of whether this is permissible.

1. The Brief [Opp.18] claims that the length of a proceeding can confer *jurisdiction,* despite the fact that lack of subject matter jurisdiction cannot be cured, and that the Respondent's defective summary petition can be made valid by borrowing legitimacy from other non related legal submissions of the Petitioner, which in fact do not and cannot cure the petition's defects. At trial such "defects" on the face of the record were held by the court to be indicia of its determination of "Ulster's incompetence."

The Court:

"The court is mindful of "Ulster's incompetence" as well as the many other errors and omissions disclosed during the trial." [P.Brief App.83]

"This is another example of the sloppy and "incompetent" legal work involved in this joint venture." [P.Brief App.80]

" . . . there were many loose ends and extremely sloppy legal work and use of inappropriate forms, failure to timely record instruments, and many other shortcomings as noted in plaintiff's brief . . . " [P.Brief App.79]

" . . . careless legal work and terminology . . . " [P.Brief App.81]

2. The Court is respectfully asked to consider the implications of the improbable version of events and circumstances described by the Respondent in its brief relative to the parties' joint venture. The March 1, 1985 Agreement between the parties provided that on thirty days notice, the bank could end the venture, with the respective parties free to independently pursue their interests, if the bank, *in its sole discretion*, determined that the Petitioner was in default under the terms of the Agreement. The trial court held that the Respondent could have sought judicial assistance if the Petitioner failed to vacate any relevant property referenced in the Agreement. [P.Brief App.81]

With this leverage, why would the Respondent remain in a joint venture with a mortgagor, if the venture were intolerably off schedule and the joint venture partner's professional efforts were not timely and productive? There are only two viable answers, "incompetence" or fraud. The bank cannot claim benevolence or fiduciary obligations. [P.Brief App.87]

No notice of default was ever issued by the Respondent, rendering the bank's claims of victim hood completely and totally disingenuous. The bank knew that all relevant legal documents were in the Petitioner's name, and the bank had to *engineer* a mechanism to get rid of the Petitioner, keep the money, keep the property and keep the profits. The Respondent executed a scheme (1) to file possibly forged certainly improperly obtained referee deeds, (2) to divest joint venture assets during litigation, and (3) to fabricate a landlord-tenant relationship for quick disposal of the matter in Justice Court.

3. As it has successfully done with impunity before the reviewing courts, on page 4 of its Brief [Opp.] the Respondent makes known false material statements to this Court. Ulster Savings Bank *did not* obtain title to the Development property through an **October 25, 1984** foreclosure judgment [R.2132, 2133] [Compare App.111], and the Petitioner's mortgage debt obligations to the Respondent are identified in the March 1, 1985 Agreement as a continuing debt obligation against the Petitioner. [R.99] The trial court held that the Petitioner's debt was not liquidated, [P.Brief App.80] and the Judgment against the Petitioner contains 38 pages bearing the heading, "Dimery Indebtedness." [P.Brief App.17-55] The judgment conclusions relative to the non liquidation of the debt are disputed by the Petitioner and the issue was raised properly on appeal.

The bulk of the subdivision property, consisting of a fifteen acre parcel improved by three structures, was never mortgaged to Ulster by the Petitioner and *was not* **included in the papers submitted by the bank to the** foreclosure court relative to the default judgment obtained by the Respondent on October 25, 1984, unknown to the Petitioner until litigation. The portion of the Development property in question concerned two adjacent vacant lots,

with separate tax map numbers. This October 25, 1984 default foreclosure judgment is an out-of-venue proceeding, which absent a filed affidavit of Service deprived the court of jurisdiction over the person of the Petitioner, an issue which is not time barred relative to a default proceeding. The trial court held that the issue is "moot" because the Petitioner deeded the non mortgaged to Ulster property to the Respondent on March 1, 1985 in conjunction with the Agreement signed on that date, holding that the collateral deed was simply a gift of valuable real property to the Respondent, with no corresponding obligations on the part of the Respondent to the Petitioner. [See Brief Opp.18 note 9, P.Brief App.80]

4. The case record, however, contradicts this material interpretation of the lower courts. The Respondent bank was fully aware that it had no legal rights concerning the Petitioner's non mortgaged to Ulster property. Chairman Howard St. John stipulated at trial that not all of the subject properties were mortgaged to the Respondent. [R.951 line 19] The solution designed and executed by the Respondent, a federally regulated banking corporation, was to totally fabricate a **December 18, 1984** foreclosure proceeding, and claim ownership of the Petitioner's property not mortgaged to the bank. This false claim was made to the NYS Department of Banking, the FDIC and to the tenants of the Petitioner, residing on the non mortgaged to Ulster property. [P.Brief App.100, 102] The General Ledger of the Respondent bank, reviewed by federal regulators and examiners, claimed this as foreclosed property, labeled ORE. [P.Brief App.96-99] Current records in the Putnam County Clerk's Office, before the trial court, report that on January 29, 1986, during the parties joint venture, *after* the Petitioner had obtained preliminary approval for an 11 lot subdivision under a deed in her favor, Ulster Savings Bank did surreptitiously

file the collateral deed given by the Petitioner on March 1, 1985, claiming fee ownership of the Petitioner's non mortgaged to Ulster and property mortgaged to Ulster, with no notice to the Petitioner, a fact learned by the Petitioner during litigation. The circumstances surrounding the actual date of this "filing" are unclear. Final subdivision approvals for Sections I and II of the Pine Manor Subdivision were granted in the name of the Petitioner, under a filed deed in favor of the Petitioner. [P.Brief App.110, 111] No such collateral deed "filing" by the Respondent was located by the relevant planning board principals in August or November of 1987 [maps #2252 & #2252A] or on June 10, 1988, when the Petitioner's subdivision map #2252B was filed to correct a technical deficiency in a lot line. [P.Brief App.107-109]

5. A judgment determines the rights of the parties in an action, and must refer to and state the result of a decision in a civil proceeding or recite the circumstances on which it is based. As detailed in the Petitioner's *Brief*, Judgment in this case improperly and unconstitutionally assigns liability to the Petitioner under an unknown Contract dated **December 18, 1984**, the same date as that of the foreclosure proceeding totally fabricated by Ulster Savings Bank, relative to property not mortgaged by the Petitioner to the Respondent. The case Judgment is silent on the subject of trial, the March 1, 1985 Agreement between the parties of which the current President of the Respondent Clifford Miller and Loan Officer John Schussler were co-administrators. [R.962 line 11]. False assignment of liability under judgment is a constitutional issue properly before this Court.

6. This case is replete with erroneous proceedings where liability has been assigned to the Petitioner relative to non-existent property, [Mahopac Falls, NY; Garrison, NY; Lake Carmel, NY; Carmel, NY], non-existent foreclosure

representations [December 18, 1984], non-existent landlord tenant relationships, and non-existent contracts. This is a serious jurisdictional issue before the Court, raising the question of whether a court can be invested with jurisdiction, and possess jurisdictional competence to proceed to judgment, relative to subject matter which does not exist.

7. The trial court *did not* possess jurisdictional competence to proceed to judgment on October 26, 2000, while the Decision & Order of the court was on appeal. The appeal process ended on November 17, 2000. [See P.Brief11]

> "when the cause is taken over by a reviewing court on appeal or other proceeding in review, the trial court is divested of jurisdiction of the subject matter during the period of review, and has no power to vacate or modify the judgment or otherwise to deal with the cause" . . . And any "proceedings taken after the notice of appeal was filed are a nullity." *Davis v. Thayer*, supra, 113 Cal.App.3d at p. 912; the parties cannot invest a trial court with jurisdiction during the pendency of an appeal. (See, e.g., *In re Johannes* (1931) 213 Cal. 125, 131).

8. The trial court exercised appellate jurisdiction when it revisited its filed Decision & Order, amended the Decision & Order, and added in excess of $ 600,000.00 to the Petitioner's alleged debt, affecting substantial rights of the Petitioner, in violation of CPLR 5019(a) [P.Brief11] altering the outcome of the case. *The off the record "guidance" writing of the trial court reversed the position of the Petitioner from winner to looser of the case.*

The issue before the Court is not New York State procedure, but the deliberate dispensing with the known proper procedure by the trial court in an act of judicial

bias and seeming collusion, resulting in jurisdictional defects and constitutional structural error in this case in violation of the Petitioner's right to a "fair" trial.

9. In this case, there are significant federal questions relative to the bank's testimony under oath that the FDIC was fully aware of and gave explicit approval to the bank's conduct relative to joint venture assets. [See P.Brief7; R.1090 lines 4-10] The trial court's holding [See P.Brief4] that the Respondent did not enter the agreement or the ensuing revenue receipts in its books and records is prima facie evidence that Ulster's representations to the FDIC relative to this case were demonstrably false and misleading to the severe prejudice of the Petitioner, while the Petitioner was led by the Respondent to believe that accountings prepared by the bank's mortgage department and given to her by the Respondent were valid 'on the books' verification of the liquidation of her mortgage debt.

Referencing the Federal Deposit Insurance Act of 1950, 13(e), 64 Stat. 889, as amended, 12 U.S.C. 1823(e), the Court stated in *Langley v. FDIC,* 484 U.S. 86 (1987):

> One purpose of 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by state or federal authorities, see 12 U.S.C. 1817(a)(2), 1820(b) . . . Neither FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions. . . .
>
> A second purpose of 1823(e) is implicit in its requirement that the "agreement" not merely be on file in the bank's records at the time of an

> examination, but also have been executed and become a bank record "contemporaneously" with the making of the note and have been approved by officially recorded action of the bank's board or loan committee. . . .
>
> The harm to the FDIC caused by the failure to record occurs no later than the time at which it conducts its first bank examination that is unable to detect the unrecorded agreement and to prompt the invocation of available protective measures, including termination of the bank's deposit insurance. See 1818 (1982 ed. and Supp. IV). Thus, insofar as the recording provision is concerned, the state of the FDIC's knowledge at that time is what is crucial. But as we discussed earlier, see supra, at 92, 1823(e) is meant to ensure more than just the FDIC's ability to rely on bank records at the time of an examination or acquisition. The statutory requirements that an agreement be approved by the bank's board or loan committee and filed contemporaneously in the bank's records assure prudent consideration of the loan before it is made, and protect against collusive reconstruction of loan terms by bank officials and borrowers (whose interests may well coincide when a bank is about to fail).
>
> The short of the matter is that Congress opted for the certainty of the requirements set forth in 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew. It would be rewriting the statute to hold otherwise.

10. The lower courts did not deny the legitimacy of the claims of the Petitioner, and did not find that the conclusions of law advanced by the Petitioner were erroneous. That the courts were silent is the basis of the

Petitioner's claim that silent harmless error review had to have been carried out by the courts, affecting substantial rights of the Petitioner. The only other conclusions are that the reviewing courts never read the papers, or did affirm the judgment with bias, claims which were not made by the Petitioner.

11. On page 15 [Brief Opp.], the Respondent states that the Petitioner held false affidavits to be the basis of claims that the proceedings were erroneous. The Petitioner demonstrated that nearly three million dollars in joint venture assets were divested by the Respondent bank during litigation, without notice to the Petitioner, and that the adjudicated finding at trial that the sum in question was only $270,000.00, known by the trial court to be false, affect substantial constitutional rights of the Petitioner, depriving the Petitioner of a fair trial.

CONCLUSION

For the foregoing reasons, and for those in the petition, the petition for Writ of Certiorari should be granted. In the alternative, the petition should be granted, the judgment below as appealed from should be vacated in its entirety, and the case remanded for consideration consistent with the determinations of the Court.*

Respectfully submitted,

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* Based upon information and belief, Ulster's counsel, the law firm of Chairman Howard St. John, general counsel to the Respondent bank, was dissolved during trial, shortly before the determination of Ulster's "incompetence," lack of legal qualifications and fitness to carry out required duties.